2004

STATE OF UTAH, Plaintiff and Petitioner, v. TAN JA RYNHART, Defendant and Respondent.: Brief of Petitioner

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Petitioner,	:	
v.	:	
TANJA RYNHART,	:	Case No. 20040115-SC
Defendant/Respondent.	:	

BRIEF OF PETITIONER

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ON WRIT OF CERTIORARI TO
THE UTAH COURT OF APPEALS

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November 18, 2004

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Re: ***State v. Tanja Rynhart***,
Case No. 20040115-SC

Dear Ms. Richards:

Attached please find amended copies of the table of contents for the State's Brief of Petitioner filed with the court on November 8, 2004 in the above named case. There was one paragraph missing from the table which is the overall statement of the State's argument in this brief. Sorry for the inconvenience.

Sincerely,

Lee Nakamura

Lee Nakamura
Criminal Appeals Division

cc: James M. Retallick
Jon Bunderson

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BRIEF OF PETITIONER

JURISDICTION AND NATURE OF PROCEEDINGS

This Court granted certiorari to review ***State v. Rynhart***, 2003 UT App 410, 81 P.3d 814 (opinion attached in *Addendum A*), which reversed the trial court's denial of defendant's motion to suppress (ruling attached in *Addendum B*). Jurisdiction exists under UTAH CODE ANN. §§ 78-2-2(3)(a) & -2(5) (West 2004).

ISSUE PRESENTED AND STANDARD OF REVIEW

Did defendant forfeit a reasonable expectation of privacy in her minivan and its contents when she left the vehicle wrecked and unlocked on another's property and failed to notify the property owner or police of the damage she had caused?

On certiorari review, this Court reviews "the decision of the court of appeals, not the decision of the trial court." ***State v. Harmon***, 910 P.2d 1196, 1199 (Utah 1995). "The correctness of the court of appeals' decision turns on whether that court accurately reviewed

the trial court's decision under the appropriate standard of review." ***State v. James***, 2000 UT 80, ¶ 8, 13 P.3d 576. In reviewing a denial of a motion to suppress, the trial court's conclusions of law are reviewed for correctness and its factual findings are reviewed for clear error. ***State v. Pena***, 869 P.2d 932, 936-939 & n.4 (Utah 1994); ***State v. Veteto***, 2000 UT 62, ¶ 8, 6 P.3d 1133.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. CONST. Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Defendant was charged with possession of cocaine, an enhanced second degree felony, in violation of UTAH CODE ANN. § 58-37-8(2)(b)(ii), (4)(a) (West 2004), and possession of paraphernalia, a class B misdemeanor, in violation of UTAH CODE ANN. § 58-37a-5 (West 2004). Following a preliminary hearing on 29 May 2002, defendant was bound over for trial. R15; R72:15. Defendant subsequently moved to suppress drugs seized pursuant to a warrantless search of her purse, which she left inside her wrecked minivan on another's private property. R24-27. The same judge who conducted the preliminary hearing conducted the evidentiary hearing on the motion to suppress. R72-73. Because the judge was familiar with the essentially undisputed evidence adduced at the preliminary hearing, the

suppression hearing was abbreviated. R73. The trial court denied the motion to suppress, ruling that defendant had not "abandoned" her vehicle or its contents, but that the warrantless search was otherwise justified under the emergency aid doctrine. R44-48 (*Add. B*).

Defendant successfully petitioned the court of appeals for interlocutory review. A majority of the court of appeals' panel reversed the trial court's ruling. ***See Rynhart***, 2003 UT App 410, ¶ 18 (*Add. A*). The majority concluded that the trial court's underlying findings were clearly erroneous and failed to support the trial court's determination that there was an emergency or that the emergency aid doctrine applied. ***See id.*** at ¶ 13 (citing ***Salt Lake City v. Davidson***, 2000 UT App 12, ¶ 12, 994 P.2d 1283). In a footnote, the majority addressed the State's alternative ground for affirmance—that defendant forfeited any reasonable expectation of privacy in the minivan and its contents after leaving the vehicle wrecked and unlocked on another's property. ***See id.*** at ¶ 9 n.3. The majority first opined that the State had not preserved the issue because it had not cross-appealed on the alternative ground, but then rejected the argument on its merits by affirming the trial court's conclusion that defendant retained a legitimate expectation of privacy in the vehicle and its contents. ***See id.***

The dissent agreed that the emergency aid doctrine did not justify the warrantless search, but disagreed with the majority's conclusion that "[defendant] maintained a reasonable expectation of privacy in the minivan and its contents when, following a single car accident, she left it, unsecured and parked on property not owned by [defendant]." ***See id.*** at ¶ 20 (Thorne, J., concurring and dissenting). The dissent first noted that the State was

under "no duty" to cross appeal because an appellate court is "permitted to affirm the trial court's order—in this case the denial of the motion to suppress—on any grounds apparent from the record, even if the trial court addressed the ground [relied] upon in a subsidiary ruling." ***Id.*** at ¶ 20 n.1. Turning to the merits, the dissent criticized the majority's reliance on cases having "little or nothing to do with the issue of abandonment." ***See id.*** at ¶¶ 21-23. The majority's flawed abandonment standard "fl[ew] in the face of widely accepted abandonment analysis for Fourth Amendment purposes" and failed to consider the totality of the circumstances supporting the State's alternative theory. ***See id.*** at ¶¶ 20, 24 n.4 & 35 n.8. The dissent concluded that defendant forfeited any legitimate expectation of privacy in her vehicle and her purse left on its floor when she failed to take "normal precautions to maintain her privacy" and left the vehicle unlocked on another's private property for over five and one-half hours without notifying the property owner or police of the accident. ***See id.*** at ¶¶ 24 & 31-36 (citations and internal quotation marks omitted). Consequently, the dissent concluded that the trial court had correctly denied defendant's motion to suppress, through not under the correct theory. ***See id.*** at ¶ 39.

The State timely petitioned for a writ of certiorari, which this Court granted.

STATEMENT OF THE FACTS[1]

[1]On certiorari, this Court applies the same standard of review applied by the court of appeals, that is, it reviews the facts in the light most favorable to upholding the denial of defendant's motion to suppress. ***See State v. Layman***, 1999 UT 79, ¶ 3, 985 P.2d 911; ***State v. Tetmyer***, 947 P.2d 1157, 1158 (Utah App. 1997); ***State v. Delaney***, 869 P.2d 4, 5 (Utah App. 1994);

About 8:30 a.m., on 6 January 2002, Officer Burnham of the Brigham City Police Department received a dispatch report of an abandoned or wrecked vehicle in a field. R72:2-3. Arriving at the scene of what appeared to be an accident, Officer Burnham saw a minivan "out in the middle of a swamp." R72:3. The minivan had "traveled over the curb [of West Forest Street], down an embankment," and "through two fences" before coming to rest "out in the marsh." *Id.* It had snowed at approximately 3:00 a.m. that morning and the tire tracks of the van were snow covered. Officer Burnham surmised that the accident occurred at least five and one-half hours earlier, sometime prior to 3:00 a.m. R72:4.

The officer walked down the embankment to the wrecked vehicle, but saw no one outside the minivan. R72: 4-5. He opened the van's unlocked door and looked inside to see if he could determine the identify of the van's owner and/or driver and to determine "if anybody was in the vehicle at all." R72:4-5; R73:10. No one was inside, but the officer observed a briefcase on the front passenger seat and a purse on the floor. *Id.* He opened the purse and located defendant's driver's license, as well as $329 in cash and "a small bag that had a white powdery substance in it." *Id.* He observed a partially full bottle of vodka in the console area between the two front seats. *Id.*

Officer Burnham tried unsuccessfully to reach defendant by telephone. R72:4-5, 7-8. The owner of the field arrived at the scene a few minutes later; he wanted the minivan removed from his property so he could repair his damaged fences. R72:5-6; R73:10. At approximately 9:35 a.m., Officer Burnham arranged for the van to be towed off the property.

R72:6; R73:13. Before it was removed, Officer Burnham "look[ed] through the entire vehicle for any valuables," noted the purse and briefcase, but did not otherwise prepare a written inventory of the van's contents. R72:7-8; R73:11-13. Officer Burnham was at the scene for one and one-half hours or until approximately 10:00 a.m. R73:13. During that time, defendant did not return to her vehicle or otherwise contact the property owner or police. R72:4, 7-8.

Approximately four hours later, around 2:00 p.m., the tow company contacted Officer Burnham and told him that defendant was trying to recover the minivan. R72:6. Officer Burnham met defendant at the wrecking yard and asked her about the baggie he had found in her purse. Defendant "kind of laughed and said [she had forgotten] about that" and claimed the cocaine belonged to a friend. R72:7.

SUMMARY OF ARGUMENT

The Fourth Amendment protects people, not objects. Consequently, whether a particular object is entitled to constitutional protection depends on its nature, its use, its location, and the reasonableness of a defendant's expectation that it would be free from warrantless governmental intrusion. The same object may be constitutionally protected in one location, but not protected in another. Similarly, an object may be constitutionally protected at one point in time, but not protected at another. Nevertheless, the inquiry for Fourth Amendment purposes is always whether—*at the time of the search*—the defendant had a subjective expectation of privacy in the place and object to be searched, which

expectation was objectively reasonable given the totality of the surrounding circumstances, including defendant's words, actions, and conduct.

Here, defendant had no legitimate expectation of privacy in her van or purse at the time of the police search. Defendant left the scene of an accident without notifying the property owner or police as required by statute. She left her vehicle in a swampy marsh on another's property. She did not lock the vehicle's doors or otherwise secure her personal possessions. Because she did not safeguard the vehicle or its contents, she forfeited any reasonable expectation that either would be protected from invasion. Because any passer-by had open access to the vehicle and purse, defendant cannot complain that the police had equal access. In sum, the search of defendant's minivan and purse did not implicate the Fourth Amendment.

ARGUMENT

DEFENDANT FORFEITED ANY REASONABLE EXPECTATION OF PRIVACY WHEN SHE LEFT HER PURSE IN PLAIN VIEW IN HER UNLOCKED VEHICLE IN A MARSH AND FAILED TO NOTIFY THE PROPERTY OWNER OR POLICE OF THE DAMAGE SHE HAD CAUSED

In ***Rynhart***, 2003 UT App 410, ¶ 9 n.3, the majority held that defendant did not "abandon" her expectation of privacy in her minivan and purse and, therefore, the Fourth Amendment applied. Concluding that no exception justified the warrantless search, the majority reversed the trial court's denial of defendant's motion to suppress. ***Id.*** at ¶ 18. For the reasons discussed below, the decision is erroneous.

(A) "Abandonment" in the Fourth Amendment context is distinct from property law.

The Fourth Amendment protects people, not objects or places. ***See Rakas v. Illinois***, 439 U.S. 128, 133-34 (1978); ***Katz v. United States***, 389 U.S. 347, 351 (1967). As a result, the amendment is only marginally concerned with property rights. *1 Wayne R. LaFave,* ***Search and Seizure*** *§ 2.1(a), at 377 (3rd ed. 1996) [hereafter* ***LaFave****].* Instead, the protection of the Fourth Amendment depends on whether a person's words, actions, and conduct demonstrate a subjective intent to keep her activities and/or possessions private and whether that subjective intent is objectively reasonable given the totality of the surrounding circumstances. ***See Rakas***, 439 U.S. at 143 n.12. Consequently, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." ***Katz***, 389 U.S. at 351. "The police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." ***California v. Greenwood***, 486 U.S. 35, 41 (1988).

A person may have an expectation of privacy in an object or place, but forfeit that expectation through her words, actions, and conduct. ***Id.*** at 39-40 (refusing to recognize a privacy interest in trash left on the street). Prior to ***Rakas***, courts commonly referred to this as "abandonment." ***See, e.g., Hester v. United States***, 265 U.S. 57, 58 (1924). "Abandonment," however, is a term of art with a distinct meaning in property law, that is, "the relinquishing of a right or interest with the intention of never again claiming it." ***Black's Law Dictionary*** (8th ed. 2004). ***Rakas*** made clear that such "arcane concepts of

property law" do not control Fourth Amendment analysis. ***See Rawlings v. Kentucky***, 448 U.S. 98, 105 (1980).

"The distinction between abandonment in the property-law sense and abandonment in the constitutional sense is critical to a proper analysis of the issue." ***LaFave*** at 574 (citation and quotation marks omitted).

> In the law of property, the question . . . is whether the owner has voluntarily, intentionally, and unconditionally relinquished his interest in the property so that another, having acquired possession, may successfully assert his superior interest. . . . In the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. . . . In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein.

Id. Consequently, "even an inadvertent leaving of effects in a public place, whether or not an abandonment in the true sense of the word, can amount to a loss of any justified expectation of privacy." ***LaFave*** at 575-76. Fourth Amendment privacy expectations will vary with the type of property involved as well as the location of the property at the time of the search. ***See LaFave*** at 579. ***See, e.g., Rawlings***, 448 U.S. at 105-06 (recognizing that even through Rawlings owned the drugs in question, he forfeited any legitimate expectation of privacy when he placed them in his companion's purse); ***Katz***, 389 U.S. at 351 (noting that what a person "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected"); ***United States v. Ramapuram***, 632 F.2d 1149, 1154 (4th Cir. 1980) ("What is a reasonable expectation of privacy is by definition related to time, place and

circumstance."), *cert. denied*, 450 U.S. 1030 (1981).

(B) The Rynhart majority erroneously applied property law standards, rather than proper Fourth Amendment analysis.

The State has never contested defendant's ownership of the minivan and purse. Nor has it contested the legitimacy of defendant's expectation of privacy in the van and purse *at the time of the accident.* The State challenges only the reasonableness of defendant's expectation of privacy *at the time of the search.*

In the trial court and the court of appeals, the State contended that defendant forfeited any legitimate expectation of privacy in the van and purse when she left the purse in open view on the floor of the unlocked van in the middle of a marsh on another's property and did not notify the police or property owner of the damage she had caused as statutorily required. R44-46; ***Rynhart***, 2003 UT App 410, ¶ 9 n.3. ***See also*** UTAH CODE ANN. § 41-6-32 (West 2004) (imposing a duty on a driver who damages unattended property to locate and notify the property owner of the damage or to "attach securely in a conspicuous place on the vehicle," a note with the driver's name and address) (*Addendum C*).

The trial court agreed with the State as to what factually occurred, but nevertheless concluded that "the State had failed to carry its burden to show abandonment." R46 (*Add. B*). Quoting ***State v. Rowe***, 806 P.2d 730, 736 (Utah App. 1991), *rev'd on other grounds,* 850 P.2d 427 (Utah 1992), the trial court concluded that the evidence was not "clear, unequivocal and decisive" that defendant intended to "abandon" the vehicle when she left it in the field. R46. The court noted that while there was evidence of the path and location of the van (the

van went over the street curb, down an embankment, and came to rest in a swampy marsh in the middle of a field), but not whether it was drivable. If drivable, the trial court believed the officer may have been justified in viewing the van as "abandoned." *Id.* But if damaged, the court opined that defendant may not have had time to arrange for its retrieval given the early hour of the accident and winter conditions. *Id.* After concluding that the van was not "abandoned," the trial court denied the motion to suppress on other grounds. R46-47.

Defendant sought and was granted interlocutory review of the denial. In the court of appeals, the State argued the merits of the trial court's ruling, but additionally argued that the denial could be sustained on the alternative ground that defendant lacked a reasonable expectation of privacy in the van and purse at the time of the search. ***See*** *Brief of Appellee, No. 20020760-CA, at 18-21.* A majority of the court of appeals' panel initially refused to consider the merits of the State's alternative argument on procedural grounds, but then considered and rejected its merits.[2] ***See Rynhart***, 2003 UT App 410, ¶ 9 n.3.

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[2]The majority initially concluded that the State's failure to cross-appeal on the "abandonment" theory precluded review of its merits. ***See Rynhart***, 2003 UT App 410, ¶ 9 n.3. The dissent correctly pointed out that the State had no obligation to cross-appeal when it had won below, albeit on a different theory. The dissent recognized that the interlocutory ruling—the pretrial denial of defendant's motion to suppress—could be affirmed on any ground apparent from the record. ***See id.*** at ¶ 20 n.1 (Thorne, J. dissenting) (citing ***State v. South***, 924 P.2d 354, 356 (Utah 1996)). ***Accord Bailey v. Bayles***, 2002 UT 58, ¶¶ 10 & 13, 52 P.3d 1158 (reaffirming the "well-settled" rule that an appellate court may affirm on any ground legally and factually sustainable on the record). ***But see State v. Topanotes***, 2003 UT 30, ¶¶ 9-11, 76 P.3d 1159 (refusing to remand for additional findings to support a new theory raised by the State post-verdict). Here, the factual findings necessary to support the alternative theory were fully found by the trial court: defendant left her wrecked van on another's property for over five and one-half hours, without securing the vehicle or its contents and without notifying the property

The ***Rynhart*** majority cited ***State v. Bissegger***, 2003 UT App 256, 76 P.3d 178, and numerous decisions from other jurisdictions for the proposition "that Rynhart, as a vehicle occupant, may have possessed a legitimate expectation of privacy in the contents of her vehicle." ***See Rynhart***, 2003 UT App 410, ¶ 9 n.3. The State does not contend otherwise. ***See Wyoming v. Houghton***, 526 U.S. 295, 303 (1999) (recognizing that passengers as well as drivers have a reduced expectation of privacy in personal possessions transported in vehicles).

But as recognized by the dissent, the issue here is whether "Rynhart *maintained* a legitimate or reasonable expectation of privacy in either the van or the purse" when she left them unsecured on another's property for over five and one-half hours following the accident. ***See Rynhart***, 2003 UT App 410, ¶ 23 (dissent) (emphasis added). Stated differently, did defendant forfeit a reasonable expectation that the van and purse would be protected from intrusion—whether by a passer-by or the police—when she failed to take normal steps to secure the van and its contents before leaving the vehicle on another's property for over five and one-half hours?

The ***Rynhart*** majority never focused on this question. Instead, it held that because Rynhart possessed a reasonable expectation of privacy when she occupied the vehicle, that

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owner or police of the damage she caused. R44-46. The trial court disagreed only on the legal sufficiency of these facts to establish "abandonment." ***Id.*** On appeal, the State properly re-raised its trial argument that the facts were sufficient to establish defendant's forfeiture of a legitimate expectation of privacy. ***See Bailey***, 2002 UT 58, ¶ 10; ***South***, 924 P.2d at 356. Ultimately, the court of appeals reached the merits. ***See Rynhart***, 2003 UT App 410, ¶ 9 n.3 & ¶¶ 24-39.

expectation necessarily continued until the State established that she "voluntarily relinquished" it. ***See Rynhart***, 2003 UT App 410, ¶ 9 n.3. Citing ***Bissegger***, 2003 UT App 256, the majority concluded that there was "*no* support whatsoever that Rynhart abandoned her expectation of privacy" in her purse and that the State had failed to challenge the trial court's "findings on abandonment" when it did not cross-appeal. ***See Rynhart, id.*** (emphasis in original). ***See also*** *discussion, n.2, supra.*

Bissegger's analytical foundation is ***Rowe***, 806 P.2d 730, which also formed the framework for the trial court's decision. ***See Bissegger***, 2003 UT App 256, ¶ 13. ***See also*** R45-46. In ***Bissegger***, 2003 UT App 256, ¶ 15, the court of appeals concluded that Bissegger, a vehicle passenger, did not relinquish an expectation of privacy in her lip-balm container when she left it inside a vehicle when the police ordered her to exit. The court of appeals adopted the "abandonment" standard approved in dicta in ***Rowe***:

> Determining whether abandonment occurred is 'primarily a factual question of intent to voluntarily relinquish a reasonable expectation of privacy.' ***Rowe***, 806 P.2d at 736. Thus, the abandonment determination involves two inquiries: (1) whether the individual relinquished a legitimate expectation of privacy in the item; and (2) whether the relinquishment was voluntary. ***See id.*** 'The burden of proving abandonment falls on the state, . . . and must be shown by clear, unequivocal and decisive evidence.' ***Id.***

Bissegger, 2003 UT App 256, ¶ 14. As the ***Rynhart*** dissent recognized, the ***Bissegger-Rowe*** standard conflicts with established Fourth Amendment analysis.[3] ***See Rynhart***, 2003 UT

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[3]***Rowe*** was overturned by this Court on other grounds, rendering its discussion of expectation of privacy non-controlling. In ***Bissegger***, the court of appeals formally adopted the ***Rowe*** dicta. This Court has not previously addressed the issue.

App 410, ¶24 n.4.

Though the Fourth Amendment is only marginally concerned with property concepts, ***see*** *discussion, supra*, the ***Bissegger-Rowe*** standard impermissibly incorporates property terms and standards. "Abandonment" is used in its property sense, that is, to voluntarily relinquish ownership. ***See Bissegger***, 2003 UT App 256, ¶ 14; ***Rowe***, 806 P.2d at 736. Similarly, the ***Bissegger-Rowe*** requirement that relinquishment be proven by "clear, unequivocal and decisive evidence" is a civil standard imposed to determine when lawful ownership has been permanently forsaken. ***See Anderson v. Brinkerhoff***, 756 P.2d 95, 98-99 (Utah App. 1988); ***Linscomb v. Goodyear Tire & Rubber***, 199 F.2d 431, 435 (8th Cir. 1952) (cited in ***Friedman v. United States***, 347 F.2d 697, 704 (8th Cir.), *cert. denied,* 382 U.S. 946 (1965), which case was cited in ***Rowe***, 806 P.2d at 730). Moreover, a "clear and unequivocal" standard of proof conflicts with the preponderance of the evidence standard normally applied to suppression issues. ***See, e.g., Colorado v. Connelly***, 479 U.S. 157, 168 (1986) (holding that the prosecution has no greater burden than a preponderance to establish a waiver of "Miranda" rights); ***United States v. Matlock***, 415 U.S. 164, 177 n.14 (1974) (recognizing that "the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence"); ***State v. Hansen***. 2002 UT 125, ¶ 56, 63 P.3d 650 (imposing a preponderance standard in determining the voluntariness of a consent to search); ***State v. Brown***, 853 P.2d 851, 855 (Utah 1992) (imposing a preponderance standard in determining if common authority exists to support a consent to

search and recognizing that in any suppression hearing, there is "no greater burden than proof by a preponderance of the evidence"); ***State v. Bullock***, 699 P.2d 753, 755 (Utah 1985) (recognizing that in any suppression hearing, the preponderance standard applies).[4]

Nevertheless, the trial court and the ***Rynhart*** majority fully embraced the ***Bissegger-Rowe*** standard. ***See*** R45-46; ***Rynhart***, 2003 UT App 410 ¶ 9 n.3. The standard led both courts to erroneously conclude that defendant necessarily retained her expectation of privacy in her van and purse unless the State established clearly and unequivocally that she intentionally and voluntarily relinquished any interest she had in her vehicle and purse when she left the accident scene. As will be discussed below, the Fourth Amendment does not require such proof.

(C) The Rynhart majority erroneously focused on defendant's future intent, rather than the objective reasonableness of her actions and conduct at the time of the search.

Whether an expectation of privacy exists is a "question of intent." ***See LaFave*** at 550. Here, the ***Rynhart*** majority concluded that there was "*no* support whatsoever that Rynhart abandoned her expectation of privacy in her purse . . . or wallet." ***Rynhart***, 2003 UT App 410, ¶ 9 n.3. The majority appears to have reached this conclusion because no evidence was presented of defendant's actual subjective intent. The Fourth Amendment, however, does

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[4]Two of the cases cited in ***Rowe*** in support of a "clear and unequivocal" standard pre-date ***Rakas***. ***See Rowe***, 806 P.2d at 736 (citing ***Friedman***, 347 F.2d 697 and ***United States v. Boswell***, 347 A.2d 279 (D.C. 1975)). These cases have been modified post-***Rakas***. ***See*** *n.5, infra.* The third case cited, ***O'Shaughnessey v. State***, 420 So.2d 377 (Fla. App. 1982), was reaffirmed in ***State v. K.W.***, 832 So.2d 803, 805 (Fla. App. 2002).

not require the State to present evidence of a defendant's internal thoughts—indeed, it would rarely be possible to do so. Instead, "[t]he test is an objective one, and intent may be inferred from words spoken, acts done, and other objective facts." ***United States v. Thomas***, 864 F.2d 843, 846 (D.C. Cir. 1989) (cited with approval in ***Rowe***, 806 P.2d at 736).

The majority's confusion undoubtedly arises from ***Rowe***, as adopted in ***Bissegger***. ***Rowe*** initially cited ***Thomas*** and other authority for the correct proposition that the "question of intent" is an objective determination. ***See Rowe***, 806 P.2d at 736. In its next paragraph, however, ***Rowe*** cited ***Narian v. State***, 556 A.2d 1158, 1161 n.4 (Md. App. 1989), *cert. denied*, 562 A.2d 718 (Md. 1989), for the contradictory proposition that intent is judged from the "vantage point of the defendant and not the police." ***See id.*** Even the Maryland court recognized that their discussion of intent was only dicta. ***See Narian***, 556 A.2d at 1161 n.4. ***See also*** *20* ***Maryland Law Encyclopedia***, *Searches and Seizures § 14 (2004)* (recognizing that Maryland law dictates that even though intent is subjective, it "is determined from the objective facts at hand"). The other authority cited in ***Rowe*** has also been modified in light of ***Rakas***'s clear pronouncement that only a subjective intent which is objectively reasonable can invoke constitutional protection.[5] ***See*** *discussion, supra.*

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[5] ***Rowe*** cited ***Friedman*** and ***Boswell***. ***See*** *n.4, supra.* Post-***Rakas***, the Court of Appeals for the District of Columbia noted that ***Boswell*** was wrong in concluding that a defendant's subjective intent controlled. ***See Godfrey v. United States***, 408 A.2d 1244, 1246-47 & n.1 (D.C. Cir. 1979). Similarly, the Court of Appeals for the Eighth Circuit recognized: "Whether an abandonment has occurred is determined on the basis of the objective facts available to the investigating officers, not on the basis of the owner's subjective intent." ***United States v. Tugwell***, 125 F.3d 600, 602 (8th Cir. 1997), *cert. denied*, 522 U.S. 1061 (1998).

The ***Rynhart*** dissent correctly recognized that a defendant's subjective intent is only a factor to be considered in determining the totality of the circumstances. Indeed, many courts presume that a defendant may harbor a subjective hope that her property, though left in a public place, will be free from intrusion. ***See, e.g., Ramapuram***, 632 F.2d at 1155 (presuming that the defendant had a subjective expectation that dynamite hidden in the truck of a "junker" would not be discovered, but holding that such a belief was objectively unreasonable where the unlocked vehicle was located in an open field). Moreover, whether a defendant harbors an intent to reclaim the property in the future is not controlling, though this subjective intent, if reasonable, may be considered. ***See United States v. Barlow***, 17 F.3d 85, 88 (5th Cir.) (recognizing that a property owner need not intend to permanently relinquish ownership or possession to forfeit a reasonable expectation of privacy; she only needs to leave an item unsecured in a public place), *cert. denied*, 513 U.S. 850 (1994); ***United States v. Oswald***, 783 F.2d 663, 668 (6th Cir. 1986) (holding that if the facts known at the time of the search objectively establish no legitimate privacy expectation, a defendant's subsequent conduct cannot "revoke the abandonment nunc pro tunc").

Ultimately, the test is whether the external manifestations of defendant's intent, that is, her voluntary words, actions, or conduct, would lead a reasonable person in the searching officer's position to believe that the defendant had forfeited any legitimate privacy interest in the object or place to be searched. ***See United States v. Pitts***, 322 F.3d 449, 456 (7th Cir.), *cert. denied*, 124 S. Ct. 128 (2003); ***Tugwell***, 125 F.3d at 602; ***United States v. Perkins***, 871

F. Supp. 801, 803 (M.D. Pa. 1995) (all recognizing that whether an expectation of privacy exists must be judged by what a reasonable person in the officer's position would have believed based on the facts known at the time of the search). Such a standard is no more that the "other side of the coin" of Fourth Amendment expectation of privacy analysis. ***See People v. Contreras***, 210 Cal.App.3d 450, 259 Cal.Rptr. 290 (Cal. App. 1989) (recognizing that "standing" and "abandonment" are "two sides of the same coin;" whereas a defendant must establish an expectation of privacy, the prosecution must establish the forfeiture of that expectation) (cited with approval in ***Rowe***, 806 P.2d at 736).

As will be discussed below, here, the officer's presumption that he, like any other passer-by, could enter the vehicle and look inside the purse was reasonable based on the totality of the circumstances at the time of the search.

(D) Under proper analysis, the evidence establishes that defendant forfeited any reasonable expectation of privacy in her van and purse when she left it unlocked and in open view on another's property for over five and one-half hours.

Under proper Fourth Amendment analysis, the issue to be resolved is whether, following the accident, defendant's actions and conduct forfeited any reasonable expectation of privacy in the van and purse. ***See*** *discussion, supra.*

The facts are undisputed. ***See*** *Statement of Facts & Add. B (Ruling).* Defendant owned the minivan and purse. At the time of the accident, she had a legitimate expectation of privacy that both would be free from warrantless search.

The single-car accident was serious: defendant drove off the road, over a curb, down

an embankment and through two field fences, landing in a swampy marsh in the middle of a privately-owned field. Pursuant to UTAH CODE ANN. § 41-6-32 (*Add. C*), she was obligated to locate and notify the property owner of the damage she had caused or "attach securely in a conspicuous place on the vehicle," a note with her name and address. She did neither. Instead, she left a briefcase on the front seat, her purse on the van's floor, and a partially consumed vodka bottle in the console area between the two front seats. She did not lock the doors to the vehicle or otherwise attempt to secure it. She left the accident scene. For five and one-half hours, until the officer arrived, any passer-by could fully access the interior of the vehicle, the purse, and the briefcase. ***See*** *Statement of Facts at 4-5.* ***See also United States v. Austin***, 66 F.3d 1115, 1118-19 (10th Cir. 1995) (recognizing that a defendant must take "normal precautions" to safeguard her privacy, or assume the risk that intrusion, including governmental intrusion, may occur), *cert. denied*, 516 U.S. 1084 (1996); ***United States v. Morgan***, 936 F.2d 1561, 1571 (10th Cir. 1991) (recognizing that a legitimate expectation of privacy may not depend "entirely upon fate and the absence of inquisitive (and acquisitive) passers-by"), *cert. denied*, 502 U.S. 1102 (1992).

When the officer arrived, he searched the vehicle, but only to extent that any passer-by could have—the officer simply opened the vehicle's unlocked door and looked inside the purse and brief case which were in plain view. ***See Greenwood***, 486 U.S. at 40 (holding that property readily accessible to "animals, children, scavengers, snoops and other members of the public," is not protected from governmental search). The property owner arrived and

wanted the van removed from his property so he could repair the damage to his fences. The vehicle was towed. Four and one-half hours after it had been towed, some eleven hours after the accident occurred, defendant attempted to retrieve her property from the wrecking company. ***See*** *Statement of Facts at 5-6.*

Given the totality of the circumstances, defendant forfeited any reasonable expectation of privacy in the van and purse when she left the accident scene without securing her property and without providing notification as statutorily required. ***Accord Barlow,*** 17 F.3d at 88-90 (holding that the defendant had no expectation of privacy in his vehicle, when he left it unlocked with the key in the ignition on a public street at night); ***Oswald***, 783 F.2d at 665-67 (holding that the defendant forfeited a legitimate expectation of privacy in his suitcase when he left it in his burning car on the side of the road); ***State v. Brunson***, 771 P.2d 938, 389 (Kan. App. 1989) (holding that the defendant forfeited any reasonable expectation of privacy in his vehicle when he left it on a golf course, with its lights on, and the keys in the ignition); ***State v. Anderson***, 548 N.W.2d 40, 42 (S.D. 1996) (holding that defendant forfeited any reasonable expectation of privacy when, following an accident, he left his vehicle with the doors unlocked and the keys in the ignition)

The trial court accepted these facts, but came to a different conclusion as to their significance. Based on ***Rowe***, the trial court opined that it needed to know if the van was drivable. If it was, the court believed it would be reasonable to assume that it was "abandoned"; if not, the court presumed that defendant did not have enough time to arrange

for its recovery. R46. It was these "findings" that the court of appeals viewed as unchallenged and, therefore, binding on the State on appeal. ***See Rynhart***, 2003 UT App 410, ¶ 9 n.3. The trial court's statements, however, were not factual; they simply reflected the judge's opinion of the sufficiency of the facts. Moreover, in this case, the mobility of the vehicle is irrelevant to the privacy issue. Whatever the mobility of the minivan, it was in the middle of a marsh. Moreover, defendant failed to lock the vehicle or otherwise protect its contents when she left it, knowing that any passer-by, including the police, might investigate the obvious accident. ***See Houghton***, 562 U.S. at 303 (recognizing that when a vehicle is in an accident, it is reasonable to assume that its contents may be exposed to public scrutiny); ***Cormney v. Commonwealth***, 943 S.W.2d 629, 632 (Ky. App. 1996) (recognizing that a subjective expectation of privacy necessarily yields to the public safety interest of police investigating traffic accidents); ***Muegel v. State***, 272 N.E.2d 617, 620 (Ind. 1971) (recognizing that when an unlocked vehicle is left unattended on the road, it is reasonable for an officer to enter it to search for the vehicle's registration); ***Brunson***, 771 P.2d at 395 (recognizing that the defendant should have reasonably foreseen the possibility of a police search when he left his vehicle unlocked on a golf course); ***State v. Lemacks***, 268 S.E.2d 285 (S.C. 1980) (recognizing that the defendant should have reasonably foreseen that the police would investigate and possibly tow his unlocked vehicle when it was parked in a hazardous manner).

Based on the totality of the circumstances, defendant had no reasonable expectation

of privacy in her vehicle or purse at the time Officer Burnham searched them.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals and affirm the trial court's denial of defendant's motion to suppress. The matter should then be remanded to the district court to proceed to trial.

RESPECTFULLY SUBMITTED this 8th day of November, 2004.

MARK L. SHURTLEFF
Utah Attorney General

CHRISTINE F. SOLTIS
MARIAN DECKER
Assistant Attorneys General

MAILING CERTIFICATE

I certify that on 8th November, 2004, I caused to be mailed, postage prepaid, two copies of the foregoing BRIEF OF PETITIONER, to:

JAMES M. RETALLICK
Box Elder County Public Defender
2564 Washington Blvd., Ste. 101
Ogden, Utah 84401-1564

Attorney for Defendant/Respondent.

Addenda

Addendum A

81 P 3d 814
81 P 3d 814, 487 Utah Adv Rep 18, 2003 UT App 410
(Cite as: 81 P.3d 814)

Court of Appeals of Utah

STATE of Utah, Plaintiff and Appellee,
v
Tanja RYNHART, Defendant and Appellant

No 20020760-CA

Nov 28, 2003
Rehearing Denied Dec 18, 2003

Background Defendant was charged with possession of controlled substance within 1000 feet of public structure and possession of drug paraphernalia The First District Court, Brigham City Department, Ben H Hadfield, J , denied defendant's motion to suppress

Holding On defendant's petition for interlocutory appeal, the Court of Appeals, James Z Davis, J , held that emergency aid doctrine did not apply to justify warrantless search of defendant's vehicle
Reversed

William A Thorne Jr , J , filed opinion concurring in part and dissenting in part

West Headnotes

[1] Searches and Seizures ⚿28
349k28
Defendant did not relinquish expectation of privacy in vehicle or in purse and wallet left in vehicle found by police officer investigating one-car accident, absent any showing that driver intended to abandon vehicle after accident, or that vehicle was operable after accident U S C A Const Amend 4

[2] Automobiles ⚿349 5(1)
48Ak349 5(1)

[2] Automobiles ⚿349 5(11)
48Ak349 5(11)
Police officer did not have objectively reasonable basis to believe that emergency existed and that immediate need for assistance for protection of life or that driver could have been lost, disoriented, or injured, so as to justify warrantless search of unoccupied vehicle involved in apparent one car accident under emergency aid doctrine, and of purse and wallet found within, claim that driver may have been injured or was lost and disoriented was nothing more than speculation as there was nothing in the vehicle to indicate that anyone had been injured, and officer had no reason to believe that anything in purse or wallet would provide any information for the purpose of administering medical assistance U S C A Const Amend 4

[3] Searches and Seizures ⚿24
349k24
Warrantless searches are per se unreasonable unless undertaken pursuant to a recognized exception to the warrant requirement U S C A Const Amend 4

[4] Searches and Seizures ⚿192 1
349k192 1
The burden of establishing the existence of one of the exceptions to the warrant requirement is on the prosecution U S C A Const Amend 4

[5] Searches and Seizures ⚿42 1
349k42 1
One exception to the warrant requirement is exigent circumstances U S C A Const Amend 4

[6] Searches and Seizures ⚿42 1
349k42 1
The emergency aid doctrine, sometimes referred to as the medical emergency doctrine, is a variant of the exigent circumstances exception to the warrant requirement U S C A Const Amend 4

[7] Searches and Seizures ⚿42 1
349k42 1
A warrantless search is lawful under the emergency aid doctrine if (1) police have an objectively reasonable basis to believe that an emergency exists and believe there is an immediate need for their assistance for the protection of life, (2) the search is not primarily motivated by intent to arrest and seize evidence, and (3) there is some reasonable basis to associate the emergency with the area or place to be searched, that is, there must be a connection with the area to be searched and the emergency U S C A Const Amend 4

[8] Searches and Seizures ⚿192 1
349k192 1
Whether an emergency exists to justify a warrantless search is fact intensive and the State has the burden to prove that the exigencies of the situation make the course imperative U S C A Const Amend 4

[9] Searches and Seizures ⚿42 1
349k42 1
There must be some reliable and specific indication of the probability that a person is suffering from a serious physical injury before application of the

emergency aid exception to the warrant requirement to the search of a vehicle is justified. U.S.C.A. Const.Amend. 4.

[10] Searches and Seizures ⚿42.1
349k42.1

Under the rationale of the emergency aid doctrine, a warrantless search is allowed if the purpose of the search is to discover evidence of identification and other information that might enhance the prospect of administering appropriate medical assistance, protecting life, or avoiding serious injury to another. U.S.C.A. Const.Amend. 4.

***815** James M. Retallick, Public Defenders Association, Ogden, for Appellant.

Mark L. Shurtleff, Attorney General, and Marian Decker, Assistant Attorney General, Salt Lake City, for Appellee.

Before DAVIS, GREENWOOD, and THORNE, JJ.

OPINION

DAVIS, Judge:

¶ 1 Tanja Rynhart appeals from a trial court order denying her motion to suppress evidence seized during a warrantless search of her vehicle. We reverse.

BACKGROUND

¶ 2 On the morning of January 6, 2002, Officer Robert Burnham of the Brigham City Police Department received a dispatch call requesting investigation of an abandoned or wrecked vehicle. Burnham responded to the call at approximately 8:30 a.m. Upon arriving at the location of the vehicle, Burnham discovered that the vehicle had "traveled over the curb, down an embankment, [and] through two fences," before coming to rest in a "marsh" or "swamp." Burnham also discovered that the tire tracks leading to the vehicle were covered with snow. Because Burnham recalled that "[i]t had snowed as recently as 3:00" a.m., he determined that the accident had occurred at some point prior to that time.

¶ 3 As Burnham approached the vehicle, he saw that it had a license plate, but he did not attempt to identify the owner of the vehicle by using the license plate number. Burnham entered the unlocked vehicle and discovered that there was no one inside. At the May 29, 2002 preliminary hearing, Burnham testified that his purpose for entering the vehicle was to "[t]ry to find out the identity of the owner, the driver, and if anybody was in the vehicle at all." However, at the July 22, 2002 hearing ***816** on the motion to suppress, Burnham admitted that he performed a "very thorough search" of the vehicle, and testified that he "opened all the doors" and "looked under the seats." He testified that there were "quite a number of items in the vehicle," but admitted that he did not inventory all of the vehicle's contents. Burnham indicated that he was "primarily concerned with" finding and retrieving any "jewelry," "money," or "valuables" that may have been left in the vehicle.

¶ 4 In his search of the vehicle, Burnham found a partially full bottle of vodka in the console between the two front seats, a briefcase on the front passenger seat, and a purse on the floor near the front passenger seat. He searched through the purse and the briefcase to determine their contents. Inside the purse, Burnham found a wallet, which he also searched. In his search of the purse and the wallet, Burnham found Rynhart's driver license, $329 in cash, several gift certificates, a small plastic bag containing a "white powdery substance," and "a mirror with some powder on it."

¶ 5 After Burnham completed his investigation, he had the vehicle towed to a wrecking yard for "safe keeping," but did not officially impound the vehicle. [FN1] He retained the briefcase, the purse, and the items he found in the purse. At some point after he had "cleared from the scene" of the accident, Burnham attempted to contact Rynhart by phone, but was unsuccessful. Later that afternoon, someone from the wrecking yard contacted Burnham by phone to notify him that Rynhart was attempting to retrieve her vehicle. Burnham went to the wrecking yard and met with Rynhart. At that time, Burnham asked Rynhart about the small plastic bag containing white powder that he had found in Rynhart's purse. Rynhart admitted to Burnham that the small plastic bag contained cocaine, but told him that it belonged to a friend.

FN1. Burnham neither attempted to obtain a warrant nor conduct an inventory search.

¶ 6 On March 27, 2002, Rynhart was charged with possession of a controlled substance within 1000 feet of a public structure, a second degree felony, and possession of drug paraphernalia, a class B misdemeanor. At the conclusion of the May 29, 2002 preliminary hearing, the trial court ruled that there were "reasonable grounds to believe that [Rynhart] committed the offense [s]" and, accordingly, "requir[ed] that [Rynhart] be held to answer on the charges." Rynhart pleaded not guilty to both charges.

¶ 7 Thereafter, Rynhart filed a motion to suppress the evidence seized during Burnham's warrantless search of her vehicle. In its ruling on Rynhart's motion, the trial court determined that Rynhart had not abandoned her expectation of privacy in her vehicle. In support of this determination, the trial court made the following findings, which are not challenged on appeal:

> The officer inspected the vehicle at 8:30 in the morning and determined that it had been in the marsh since at least 3:00 ... that morning. The owner or driver would not have had time to make arrangements to retrieve the vehicle if it was damaged. The State failed to present any evidence of the state of the vehicle. If the vehicle could be driven, then the officer may have been more justified in believing that it had been abandoned. Although there clearly had been an accident, it appears that no other vehicles were involved. The apparent early hour, the winter conditions, and the single vehicle nature of the accident all combine to belie the officer's imputing an intent to abandon the vehicle.

However, the trial court also determined that Burnham's warrantless search of Rynhart's vehicle was justified under the emergency aid doctrine. [FN2] *See Salt Lake City v. Davidson,* 2000 UT App 12,¶ 12, 994 P.2d 1283. In support of this determination the trial court entered the following findings:

> FN2. Although the trial court refers to this doctrine as "the community caretaker function" in its ruling, it applies the elements of the emergency aid doctrine set forth in *Salt Lake City v. Davidson,* 2000 UT App 12,¶ 12, 994 P.2d 1283, to determine whether Burnham's warrantless search of Rynhart's vehicle was justified.

> The accident occurred around 3:00 a.m. on a cold January night. The absence of the driver made it imperative that the officer identify the driver so that he or she could ***817** be found. The driver could have been in distress and lost or disoriented. The officer acted appropriately in attempting to determine who was [sic] the driver. Although [Rynhart] makes a good point that the owner of the vehicle could be ascertained by using the license plate number, the owner and the driver are not necessarily the same person, and the officer had a duty to ascertain the facts in order to preserve life in the event the driver had wandered off and was lost.

Based upon its conclusion that the emergency aid doctrine was applicable, the trial court denied Rynhart's motion to suppress in an order dated September 3, 2002.

¶ 8 On September 23, 2002, Rynhart petitioned this court, pursuant to rule 5 of the Utah Rules of Appellate Procedure, to permit her appeal from the trial court's interlocutory order denying her motion to suppress. On November 5, 2002, we granted that petition and Rynhart's appeal ensued.

ISSUE AND STANDARD OF REVIEW

[1] ¶ 9 The sole issue on appeal is whether the trial court erred in denying Rynhart's motion to suppress evidence. [FN3] The trial ***818** court denied the motion based upon its determination that the warrantless search of Rynhart's vehicle was justified under the emergency aid doctrine. *See Salt Lake City v. Davidson,* 2000 UT App 12,¶ 12, 994 P.2d 1283.

> FN3. Although this is the sole issue raised by Rynhart, the State suggests that we should, without the benefit of a cross-appeal, reverse the trial court's ruling that Rynhart had not abandoned her expectation of privacy in her vehicle. Not only does the record offer scant support for that proposition, it offers *no* support whatsoever that Rynhart abandoned her expectation of privacy in her purse and the contents thereof, or her wallet and the contents thereof. In *State v. Bissegger,* 2003 UT App 256, 76 P.3d 178, we cited numerous cases addressing the issue of a motor vehicle occupant's expectation of privacy in personal belongings left in the vehicle.
> *See, e.g., United States v. Salazar,* 805 F.2d 1394, 1396 (9th Cir.1986) (holding that a car passenger had a reasonable expectation of privacy in his closed brown paper bag found on the floorboard of his companion's car); *People v. Manke,* 181

Ill.App.3d 374, 130 Ill.Dec. 192, 537 N.E.2d 13, 15 (1989) (concluding that a car passenger whose closed brown paper bag was found in car's trunk, and was searched by police, had standing to challenge search); *Arnold v. Commonwealth,* 17 Va.App. 313, 437 S.E.2d 235, 237 (1993) (holding that a car passenger had a legitimate expectation of privacy in his closed plastic shopping bag found on the floor of the car).

Other jurisdictions have also held that car passengers have a legitimate expectation of privacy in their coats or jackets found in cars. *See People v. Armendarez,* 188 Mich.App. 61, 468 N.W.2d 893, 900 (1991) (finding that car passenger had "standing to object to the search of his personal effects in the car, namely, his coat," where his coat was found on front seat of vehicle); *State v. McCarthy,* 258 Mont. 51, 852 P.2d 111, 112-13 (1993) (holding that car passenger had legitimate expectation of privacy in his jacket found crumpled on the back seat of car).

Finally, other jurisdictions have found that car passengers have a legitimate expectation of privacy in their purses left in cars. *See United States v. Buchner,* 7 F.3d 1149, 1151, 1154 (5th Cir.1993) (holding that the owner of a shoulder bag, located on the front seat of his girlfriend's car, had a legitimate expectation of privacy in the bag and its contents); *United States v. Welch,* 4 F.3d 761, 764 (9th Cir.1993) (holding that car passenger who left her purse in her boyfriend's car "had a reasonable expectation of privacy in the contents of her purse. Indeed, a purse is a type of container in which a person possesses the highest expectations of privacy."); *State v. Friedel,* 714 N.E.2d 1231, 1235-37 (Ind Ct.App.1999) (holding that car passenger whose purse was found on floor behind driver's seat and searched had standing because "a purse is clearly a container in which a person has a legitimate expectation of privacy").

Bissegger, 2003 UT App 256 at ¶¶ 9-11, 76 P.3d 178.

In his dissent, our colleague admits that these cases clearly support the proposition that vehicle occupants may possess a legitimate expectation of privacy in their personal belongings left in a vehicle. However, he asserts that we have "mistakenly" focused our attention on these cases and the proposition they stand for in reaching our conclusion that Rynhart did not abandon her expectation of privacy in her vehicle or its contents. He misapprehends our reliance upon these cases and the proposition they stand for. We do not rely upon these cases as the sole support for our ultimate conclusion on abandonment; rather, we rely upon these cases for the proposition that our colleague admits they stand for--that Rynhart, as a vehicle occupant, may have possessed a legitimate expectation of privacy in the contents of her vehicle.

We then determine that (1) Rynhart clearly had "a subjective expectation of privacy" not just in her vehicle, but also in its contents; and (2) as the trial court's unchallenged findings on abandonment establish, that this "expectation was objectively reasonable." *Id.* at ¶ 7 (quotations and citation omitted). Accordingly, Rynhart did have a legitimate expectation of privacy both in her vehicle and in its contents. *See id.*

Finally, again based upon the trial court's unchallenged findings on abandonment, we conclude that Rynhart never "voluntarily relinquish[ed] a reasonable expectation of privacy" and, accordingly, that she did not abandon her expectation of privacy in her vehicle or in its contents. *Id.* at ¶ 14 (quotations and citation omitted). In an era when our citizens' expectations of privacy are not only being eroded, but affirmatively attacked, we, too, are puzzled by the herculean effort of our esteemed colleague to obtain a result that not only is unsupported by the authorities he relies upon, unsupported by the facts, and contrary to the express ruling of the trial court, but also further erodes what is left of legitimate expectations of privacy.

The factual findings underlying a trial court's decision to grant or deny a motion to suppress evidence are reviewed under the deferential clearly-erroneous standard, and the legal conclusions are reviewed for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts.

State v. Moreno, 910 P.2d 1245, 1247 (Utah Ct.App.1996).

ANALYSIS

[2] ¶ 10 Rynhart argues that the trial court erred in denying her motion to suppress evidence. The trial court denied the motion based upon its determination that the warrantless search of Rynhart's vehicle was justified under the emergency aid doctrine. *See Salt Lake City v. Davidson,* 2000 UT App 12,¶ 12, 994 P.2d 1283.

[3][4][5][6] ¶ 11 "The Fourth Amendment prohibits all unreasonable searches and seizures. Warrantless searches are per se unreasonable unless undertaken pursuant to a recognized exception to the warrant requirement." *State v. Brown,* 853 P.2d 851, 855 (Utah 1992) (citation omitted). "The burden of

establishing the existence of one of the exceptions to the warrant requirement is on the prosecution." *State v. Arroyo,* 796 P.2d 684, 687 (Utah 1990); *see State v. Shoulderblade,* 905 P.2d 289, 294 (Utah 1995). "One such exception to the warrant requirement recognized by both the United States Supreme Court and Utah's appellate courts is exigent circumstances. The emergency aid doctrine, sometimes referred to as the medical emergency doctrine, is a variant of the exigent circumstances doctrine." *Davidson,* 2000 UT App 12 at ¶¶ 9-10, 994 P.2d 1283 (citations omitted).

[7][8] ¶ 12 In *Davidson,* we explained that

> "[t]he [emergency aid doctrine] will support a warrantless search of a person or personal effects when [a] person is found in an unconscious or semiconscious condition and the purpose of the search is to discover evidence of identification and other information that might enhance the prospect of administering appropriate medical assistance, and the rationale is that the need to protect life or avoid serious injury to another is paramount to the rights of privacy...." Several courts have also applied the emergency aid doctrine when a person is missing and feared to be injured or dead.

Id. (third and fourth alterations in original) (quoting Tracy A. Bateman, Annotation, *Lawfulness of Search of Person or Personal Effects Under Medical Emergency Exception to Warrant Requirement,* 11 A.L.R. 5th 52, § 2[a] (1993)). We adopted the emergency aid doctrine in *Davidson, see id.* at ¶ 13, and provided the following test for its application:

> [A] warrantless search is lawful under the emergency aid doctrine if the following requirements are met:
>
> (1) Police have an objectively reasonable basis to believe that an emergency exists and believe there is an immediate need for their assistance for the protection of life.
>
> (2) The search is not primarily motivated by intent to arrest and seize evidence.
>
> (3) There is some reasonable basis to associate the emergency with the area or place to be searched. That is, there must be a connection with the area to be searched and the emergency.

Id. at ¶ 12 (quotations and citation omitted). Under this test, "[w]hether an emergency exists is fact intensive and the [S]tate has the ***819** burden to prove that the exigencies of the situation make the course imperative." *Id.* at ¶ 10 (quotations and citation omitted). "This court has observed that application of the emergency aid doctrine should be strictly circumscribed ... because of the significant departure [it] takes from Fourth Amendment jurisprudence by requiring neither a warrant nor probable cause as prerequisites to a search." *State v. Comer,* 2002 UT App 219,¶ 17, 51 P.3d 55 (quotations and citations omitted), *cert. denied,* 59 P.3d 603 (Utah 2002).

¶ 13 To satisfy the first prong of the emergency aid doctrine, the State must show that Burnham had "an objectively reasonable basis to believe that an emergency exist[ed]" and that he believed there was "an immediate need for [his] assistance for the protection of life." *Davidson,* 2000 UT App 12 at ¶ 12, 994 P.2d 1283 (quotations and citation omitted). Our review of the record and the trial court's ruling reveals that several of the trial court's findings relating to the first prong are clearly erroneous.

¶ 14 The trial court determined that the first prong was satisfied based upon several findings. The trial court's findings that "[t]he accident occurred around 3:00 a.m. on a cold January night," and that the driver was "absen[t]" are supported by evidence in the record. Although these findings certainly weigh in favor of satisfying the first prong, in this case they are not sufficient, without more, to satisfy the first prong. The trial court's other findings that "[t]he driver could have been in distress and lost or disoriented" and that "the officer had a duty ... to preserve life in the event the driver had wandered off and was lost" are speculative and unsupported by evidence in the record. There is no evidence in the record indicating that facts gathered by Burnham at the scene of the accident were objectively indicative of injury to possible victims of the accident which would require him to "preserve life," or of any passengers of the vehicle being "lost," "disoriented," or "in distress." [FN4] Accordingly, we conclude that these unsupported findings are clearly erroneous.

> FN4. Indeed, the accident occurred on a major street within 1000 feet of a public structure.

¶ 15 Because the aforesaid findings are clearly erroneous, we conclude that the trial court erred in determining that the first prong of the emergency aid doctrine was satisfied. Consequently, the trial court erred in concluding that the emergency aid doctrine

was applicable in this case.

[9][10] ¶ 16 Moreover, when "strictly circumscribed," the emergency aid doctrine, as a whole, does not apply to the facts of this case. *Comer,* 2002 UT App 219 at ¶ 17, 51 P.3d 55 (quotations and citations omitted). First, because Burnham did not find anyone in the vehicle in an "unconscious or semiconscious condition," the doctrine would be applicable only if "a person [was] missing and feared to be injured or dead." *Davidson,* 2000 UT App 12 at ¶ 10, 994 P.2d 1283 (quotations and citations omitted). In that situation, "there must be some reliable and specific indication of the probability that a person is suffering from a serious physical injury before application of the [emergency aid] doctrine is justified." *Comer,* 2002 UT App 219 at ¶ 20, 51 P.3d 55. There is no evidence in the record indicating that Burnham ever observed anything at the scene of the accident that was a "reliable and specific indication of the probability that a person [was] suffering from a serious physical injury." *Id.* Without these indications, not only was Burnham not justified in searching the purse or wallet under the emergency aid doctrine, he had no reason to believe that anything that may be found in the purse or wallet would provide these indications, or that the owner of the purse or wallet was even in the vehicle when it left the roadway. Second, under the rationale of the emergency aid doctrine, a warrantless search is allowed if "the purpose of the search is to discover evidence of identification and other information that might enhance the prospect of administering appropriate medical assistance, ... protect[ing] life[,] or avoid [ing] serious injury to another." *Davidson,* 2000 UT App 12 at ¶ 10, 994 P.2d 1283 (quotations and citation omitted). Although Burnham did discover Rynhart's driver license during his warrantless search of her purse and wallet, there is no evidence in the record indicating ***820** that he searched these items for this purpose. Other than his phone calls to Rynhart, there is no evidence in the record suggesting that he took any action after completing his search of these items that could be construed as an attempt to provide "appropriate medical assistance, ... protect life[,] or avoid serious injury to another." *Id.* (quotations and citation omitted). Consequently, the trial court's application of the emergency aid doctrine, as a whole, to the facts of this case was improper.

¶ 17 Based upon the foregoing, we conclude that the trial court erred in determining that the emergency aid doctrine was applicable in this case. Therefore, we conclude that the trial court erred in denying Rynhart's motion to suppress evidence seized during the warrantless search of her vehicle.

CONCLUSION

¶ 18 We conclude that several of the trial court's findings relating to the first prong of the emergency aid doctrine are clearly erroneous. Because these findings are clearly erroneous, we conclude that the trial court erred in determining that the first prong was satisfied and that the emergency aid doctrine was applicable in this case. Moreover, we conclude that the emergency aid doctrine, as a whole, is inapplicable to the facts of this case. Therefore, we conclude that the trial court erred in denying Rynhart's motion to suppress evidence seized during the warrantless search of her vehicle.

¶ 19 I CONCUR: PAMELA T. GREENWOOD, Judge.

THORNE, Judge (concurring and dissenting):

¶ 20 I concur with the majority's conclusion that the trial court erred in admitting the evidence under the emergency aid doctrine. However, we part ways when the majority concludes that Rynhart maintained a reasonable expectation of privacy in the van and its contents when, following a single car accident, she left it, unsecured and parked on property not owned by Rynhart. [FN1] My reasons for dissenting are threefold: (1) The majority, in summarily deciding that Rynhart did not abandon her expectation of privacy, relies on a series of cases that have little or nothing to do with the issue of abandonment; (2) the abandonment standard relied upon by the majority is actually a standard applicable to property law and it flies in the face of widely accepted abandonment analysis for Fourth Amendment purposes; and (3) even under the existing Utah standard, Rynhart abandoned her subjective expectation of privacy.

> FN1. The majority points out the fact that the State failed to file a cross appeal on the issue of abandonment. However, the State was under no duty to do so. We are permitted to affirm the trial court's order--in this case the denial of the motion to suppress--on any grounds apparent from the

record, even if the trial court addressed the ground we rely upon in a subsidiary ruling. *See State v. South,* 924 P.2d 354, 356 (Utah 1996). Thus, if we are able to conclude from the record before us that Rynhart abandoned her reasonable expectation of privacy in the van, we can affirm the trial court's denial of Rynhart's motion to suppress on these grounds. *See id.* at 357.

¶ 21 The majority, in drawing its conclusion, relies on a series of cases found in *State v. Bissegger,* 2003 UT App 256,¶¶ 13-15, 76 P.3d 178. However, not only did the *Bissegger* court cite these cases for a different proposition altogether, *see id.* at ¶¶ 9-11, none of the cited cases addresses the abandonment of a legitimate expectation of privacy. *See United States v. Buchner,* 7 F.3d 1149, 1154-55 (5th Cir.1993) (addressing the scope of third party consent and probable cause to search); *United States v. Welch,* 4 F.3d 761, 765 (9th Cir.1993) (addressing the scope and effect of third party consent to search); *United States v. Salazar,* 805 F.2d 1394, 1396-98 (9th Cir.1986) (addressing a car passenger's standing to object to a search and the scope of the automobile exception to the Fourth Amendment's warrant requirement), *overruled by implication by United States v. Lopez-Angulo,* 1992 LEXIS 26380, *2 (9th Cir. October 8, 1992); *State v. Manke,* 181 Ill.App.3d 374, 130 Ill.Dec. 192, 537 N.E.2d 13, 15 (1989) (addressing a passenger's standing to object to an automobile search, as well as the voluntariness of the driver's consent to a search); *State v. Friedel,* ***821** 714 N.E.2d 1231, 1240 (Ind.Ct.App.1999) (addressing the scope and effect of a car owner's consent to search an automobile on a passenger's property contained within the car); [FN2] *State v. Armendarez,* 188 Mich.App. 61, 468 N.W.2d 893, 900-01 (1991) (examining a passenger's standing to object to a search of his personal belongings found in the car and concluding that the passenger's belongings were subject to search pursuant to the automobile exception to the Fourth Amendment warrant requirement); *State v. McCarthy,* 258 Mont. 51, 852 P.2d 111, 113-14 (1993) (addressing the scope of the automobile exception and its applicability to containers and other objects found within the car to be searched); *Arnold v. Virginia,* 17 Va.App. 313, 437 S.E.2d 235, 238 (1993) (addressing a person's standing to object to searches of their own property, but disposing of the argument under the plain view exception to the Fourth Amendment warrant requirement).

FN2. *State v. Friedel,* 714 N.E.2d 1231 (Ind.Ct.App.1999), briefly mentions, then summarily disposes of, the doctrine of abandonment, without venturing into any substantive analysis of the issue, presumably due to its inapplicability in the case. *See id.* at 1241.

¶ 22 In relying on these cases, the majority mistakenly focuses its attention on the existence of a passenger's legitimate expectation of privacy in personal belongings located in a vehicle. From the aforementioned cases, clearly cited in *Bissegger,* there is no question that passengers in automobiles may possess a legitimate expectation of privacy in their own belongings located in a vehicle. *See also Wyoming v. Houghton,* 526 U.S. 295, 303, 119 S.Ct. 1297, 1302, 143 L.Ed.2d 408 (1999) ("Passengers, no less than drivers, possess a reduced expectation of privacy with regard to property that they transport in cars, which 'trave[l] public thoroughfares.' ") (alteration in original) (citation omitted).

¶ 23 However, these cases do not support the conclusion that Rynhart maintained a legitimate or reasonable expectation of privacy in either the van or the purse. [FN3]

FN3. I am also puzzled by the majority's focus on the purse. While, admittedly, the critical evidence was discovered in the purse, had this situation involved only the purse, and not the van, there is little question that the officer's conduct would be considered eminently reasonable. The officer would have reasonably concluded that the purse, or at least the owner's reasonable expectation of privacy, had been abandoned. Thus, the critical question is whether Rynhart had or retained a legitimate privacy interest in the van, and, through the van, in its contents. *See Wyoming v. Houghton,* 526 U.S. 295, 306-07, 119 S.Ct. 1297, 1303-04, 143 L.Ed.2d 408 (1999) (acknowledging that containers in a vehicle are to be treated as a part of the vehicle for purposes of Fourth Amendment analysis).

¶ 24 Instead, our analysis should follow either *United States v. Barlow,* 17 F.3d 85 (5th Cir.1994), or *United States v. Oswald,* 783 F.2d 663 (6th Cir.1986), in addressing this issue. [FN4] In *Barlow,* following a robbery, ***823** a police officer followed the robber's escape path. *See Barlow,* 17 F.3d at 87. Along this path, the officer discovered

"a car parked at the end of a street, away from any businesses and pointed toward the freeway." *Id.* The officer approached the car and found that it was unlocked, that the engine was warm, and that a key was in the ignition. *See id.* The officer then reported the car's license plate number and was informed that the listed owner claimed "no longer to own the car." *Id.* The officer then looked in the car in an attempt to identify the current owner. *See id.* He opened the glove compartment and found a wallet, Barlow's identification, and some .38 caliber bullets. *See id.* Soon thereafter, the officer caught up to Barlow, arrested him, and, during a search incident to the arrest, discovered a loaded .38 caliber pistol. *See id.* Barlow moved to suppress the evidence discovered during the officer's search of the car, which the trial court denied. *See id.*

FN4. The *Bissegger* court, in addressing the State's abandonment argument, relied upon *State v. Rowe,* 806 P.2d 730 (Utah Ct.App.1991), *rev'd,* 850 P.2d 427 (Utah 1992) (reversing our conclusion that the warrant was invalid, thus, the supreme court had no reason to address the abandonment issue). *See State v. Bissegger,* 2003 UT App 256,¶¶ 13-15, 76 P.3d 178. However, while the *Bissegger* court noted that *Rowe* had been reversed, it failed to acknowledge that the *Rowe* decision is at best a plurality. *See Rowe,* 806 P.2d at 739 (Garff, J., concurring); 806 P.2d at 740 (Jackson, J., dissenting). Thus, the precedential value of *Rowe* is limited. Moreover, I believe that our particular abandonment standard, based on the Fourth Amendment to the United States Constitution, is fatally flawed. Through this standard, we have placed the burden on the state to show by clear, unequivocal, and decisive evidence, that the defendant actually intended to abandon his or her legitimate right to privacy. *See Bissegger,* 2003 UT App 256 at ¶ 14, 76 P.3d 178. There are two problems with this standard.

First, the expectation that the state must, essentially, prove abandonment by clear and convincing evidence, *see Rowe,* 806 P.2d at 736 (stating that "[t]he burden of proving abandonment falls on the state, and must be shown by 'clear, unequivocal and decisive evidence' " (citation omitted)), does not comport with the expectations of most other courts. *See United States v. Pitts,* 322 F.3d 449, 456 (7th Cir.2003) ("To demonstrate abandonment, the government must prove by a preponderance of the evidence that the defendant's ... actions would lead a reasonable person in the searching officer's position to believe that the defendant relinquished his property interests in the item to be searched."), *cert. denied,* --- U.S. ----, 124 S.Ct. 128, 157 L.Ed.2d 90 (2003); *United States v. Basinski,* 226 F.3d 829, 836 (7th Cir.2000) ("To demonstrate abandonment, the government must establish by a preponderance of the evidence that the defendant's voluntary words or conduct would lead a reasonable person in the searching officer's position to believe that the defendant relinquished his property interests in the item searched or seized.").

Moreover, the "clear, unequivocal and decisive evidence" standard adopted in *Rowe* is actually the standard of evidence applied in civil cases dealing with the abandonment of a property right, not the abandonment of a legitimate expectation of privacy, *see Friedman v. United States,* 347 F.2d 697, 704-06 (8th Cir.1965) (addressing the question of whether the defendants in the case had abandoned their *property rights* to certain premises or its contents), and it seems to have been unwisely imported into Fourth Amendment jurisprudence. *Accord State v. Finney,* No. 21180, 2003 WL 245727, *5, 2003 Ohio App. LEXIS 518, *14 (Ohio Ct.App. February 5, 2003) (" 'The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.' " (citation omitted)); *State v. Villegas,* No. 21100-2-III, 116 Wash.App. 1014, 2003 WL 1091032, *2 2003 Wash.App. LEXIS 416, *6 (Wash.Ct.App. March 13, 2003) (stating "the crux of our analysis is not [the defendant's] interest [in the container] as applied under property law, but his reasonable expectation of privacy in the [container] under a potential illegal search analysis."), *amended by* No. 21100-2-III, 2003 Wash.App. LEXIS 1097 (June 3, 2003); *see Linscomb v Goodyear Tire & Rubber Co.,* 199 F.2d 431, 433 (8th Cir.1952) (abandonment as an affirmative defense in replevin action); *Williams v. Barnette,* No. CA98-1261, 1999 WL 360291, **1-5 1999 Ark.App. LEXIS 409, **1-4 (Ark.Ct.App. June 2, 1999) (abandonment and easements); *Stone v. Geyser Quicksilver Mining Co.,* 52 Cal. 315, 317- 18 (1877) (abandonment and mining rights); *Mineral Mgmt. Group, Inc. v. Chandler,* NO.2002-CA-001178-MR, 2003 WL 21246036, **1-3 2003 Ky.App. LEXIS 135, **1-3 (Ky.Ct.App. May 30, 2003) (abandonment and natural gas leases); *Phillips v. Gregg,* 628 A.2d 151, 152-53 (Me.1993) (abandonment and easements); *Doherty v. Russell,* 116 Me. 269, 101 A. 305, 306-07 (1917) (abandonment and life estates); *Stieff v. Collins,* 237 Md. 601, 207 A.2d 489, 490-91 (1965) (abandonment of

nonconforming use),

Clausi v Meddaugh, 116 A D 2d 850, 498 N Y S 2d 267, 268 (N Y App Div 1986) (abandonment and easements), *Consolidated Rail Corp v MASP Equip Corp* , 67 N Y 2d 35, 499 N Y S 2d 647, 490 N E 2d 514 1986 N Y LEXIS 16334, **4-6 (N Y February 11, 1986) (abandonment and easements), *New York Connecting R Co v Queens Used Auto Parts, Inc* , 72 N Y S 2d 546, 549-50 (N Y Sup 1947) (abandonment and easements), *modified,* 273 A D 908, 77 N Y S 2d 505 (N Y App Div 1948), *Moore v DeVault,* No M2001-02225-COA-R3-CV, 2002 WL 31769110, **1-3 2002 Tenn App LEXIS 864, **8-10 (Tenn Ct App December 11, 2002) (abandonment and easements), *Second Chance Farms, Inc v Perry County,* No M200-00513- COA-R3-CV, 2001 WL 219642, **5-6 2001 Tenn App LEXIS 145, **11-15 (Tenn Ct App March 7, 2001) (abandonment and public roads), *Lipscomb v Commins,* 212 Va 543, 186 S E 2d 74, 74-75 (1972) (per curiam) (abandonment and rights of way), *see also Simms v District of Columbia,* 612 A 2d 215, 218-19 (D C 1992) (abandonment of property as an affirmative defense), *Williams v United States,* 337 A 2d 772, 774 (D C 1975) (same)

Second, our requirement that the state prove the *defendant's* intent, in other words the adoption of a subjective standard of proof, also fails to comport with most other courts' analyses of this issue *See, e g , United States v Lonedog,* 67 Fed Appx 543, 2003 WL 21357264 2003 U S App LEXIS 11687 (10th Cir 2003) ('The abandonment determination is made by objective standards However, an expectation of privacy is a question of intent which may be inferred from words spoken, acts done, and other objective facts "), *Pitts,* 322 F 3d at 456, ("[Abandonment] is an objective test[ ]"), *Basinski,* 226 F 3d at 836 ("Because this is an objective test, it does not matter whether the defendant harbors a desire to later reclaim an item, we look solely to the external manifestations of his intent as judged by a reasonable person possessing the same knowledge available to the government agents "), *United States v Yiu Pong Liu,* 180 F 3d 957, 960 (8th Cir 1999) (" '[W]hether an abandonment has occurred is determined on the basis of objective facts available to the investigating officers, not on the basis of the owner's subjective intent ' " (citation omitted)), *United States v Jones,* 707 F 2d 1169, 1172 (10th Cir 1983) ('The test for abandonment is whether an individual has retained any reasonable expectation of privacy in the object This determination is to be made by objective standards " (citation omitted)), *United States v Gutierrez-Medina,* 41 F Supp 2d 1191, 1195 (E D Wash 1998) ('The test [for abandonment of a legitimate expectation of privacy] is an objective one and intent may be *inferred* from words spoken, acts done and other objective acts " (emphasis added)), *State v Dixon,* 2001 WL 209907, *4 2001 Del Super LEXIS 66, *15 (Del Super Ct February 15, 2001) ("When determining whether property has been abandoned in the context of search and seizure analysis, the Court must administer an objective test "), *State v K W ,* 832 So 2d 803, 805 (Fla Ct App 2002) (per curiam) (Nesbitt, J , concurring) ("The test to be applied in determining whether a person has abandoned property is an objective one[ ]"), *State v Harwood,* 133 Idaho 50, 981 P 2d 1160, 1162 (Idaho Ct App 1999) ("Abandonment, in the Fourth Amendment context, occurs through words, acts, or other objective facts indicating that the defendant voluntarily discarded, left behind, or otherwise relinquished his interest in property "), *State v Villegas,* 116 Wash App 1014, 2003 WL 1091032, *2 2003 Wash App LEXIS 416, *6 (Wash Ct App March 13, 2003) ("Abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent [I]ntent may be inferred from words spoken, acts done, and other objective facts with all relevant circumstances surrounding the alleged abandonment considered " (second alteration in original) (quotations and citations omitted))

Finally, I believe the holding of *Rowe* conflicts--if not in fact, at least in spirit--with *California v Hodari,* 499 U S 621, 111 S Ct 1547, 113 L Ed 2d 690 (1991), which was decided after we issued *Rowe* In *Hodari,* the Supreme Court addressed whether the defendant had an expectation of privacy in evidence picked-up by the police after the defendant had tossed it away *See id* at 623-24, 111 S Ct at 1549 Although the opinion focused on whether the defendant had been unlawfully seized prior to discarding the evidence, the Court, relying on *Hester v United States,* 265 U S 57, 58, 44 S Ct 445, 446, 68 L Ed 898 (1924), concluded that the evidence had been abandoned by the defendant, even though he was being pursued by the police *See Hodari,* 499 U S at 629, 111 S Ct at 1552

In *Rowe,* during a search incident to a warrant, police officers informed the defendant that she was free to leave and escorted her to a bedroom to retrieve her belongings *See State v Rowe,* 806 P 2d 730, 736 (Utah Ct App 1991), *rev'd,* 850 P 2d 427 (Utah 1992) After she retrieved her shoes, she affirmatively claimed that she owned nothing else in the room *See id* ('Defendant was allowed to leave the party She was conducted to the bedroom to retrieve her shoes and was given

> the opportunity to claim any other property that belonged to her. When asked ... she stated that she had retrieved everything in the bedroom that was hers."). Later, police officers discovered defendant's purse, in which they found methamphetamine as well as defendant's identification. *See id.* at 732. Defendant was subsequently arrested, and eventually filed a motion to suppress the evidence. *See id.* On appeal, this court, after first determining that the warrant was flawed (a determination later reversed by the Utah Supreme Court), decided that the defendant had not abandoned her expectation of privacy, but instead she had made "a mere disclaimer of interest to avoid self-incrimination." *Id.* at 736. However, in retrospect it appears that, much like the defendant in *Hodari,* the defendant in *Rowe* essentially tossed away her purse. Thus, she abandoned her privacy interest in the purse. Consequently, it appears that the United States Supreme Court, sub silencio, reversed *Rowe*'s abandonment analysis and conclusion.
>
> Accordingly, I believe our abandonment standard to be incorrect and it is our duty to amend it to comport with Federal Fourth Amendment jurisprudence on this issue. Of course, it is possible that the *Rowe* standard comports with the protections afforded under the Utah Constitution. However, that question is not today before this court and is best left to another time.

¶ 25 On appeal, Barlow renewed his suppression argument. *See id.* The court, in analyzing his claim, set forth the following standard to apply when analyzing abandonment claims:

> Under *Katz v. United States,* 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967), no warrantless search is lawful if the accused manifested a reasonable expectation of privacy in the object searched. One cannot, however, manifest a reasonable expectation of privacy in an item once it has been abandoned. The test for determining when an object has been abandoned is one of intent, which "may be inferred from words spoken, acts done, and other objective facts." The accused need not have abandoned the searched item in the strict property sense, when an intent to relinquish ownership must be shown; merely an intent voluntarily to relinquish his privacy interest is sufficient. A defendant has abandoned his reasonable expectation of privacy when he leaves an item in a public place.

Barlow, 17 F.3d at 88 (citations omitted). In applying this standard, the court determined that "it was reasonable [for the officer] to assume that the car had been abandoned, and the officer was justified in searching the car to identify its owner." *Id.* In so concluding, the court stated that "[t]he only relevant ***824** facts in determining the reasonableness of Barlow's privacy expectation are the location of the vehicle, its condition, the time ..., and other factors that might have indicated an intent to relinquish ownership." *Id.* at 89. [FN5]

> FN5. The court also found that "[t]he only fact weighing against the conclusion that the vehicle had been abandoned was that it was still warm." *United States v. Barlow,* 17 F.3d 85, 89 (5th Cir.1994). However, even taking the warm hood into account, the court concluded that "a police officer who discovers an unlocked car at the end of a public street with the key in the ignition could reasonably conclude that the car had been abandoned." *Id.* Thus, the court determined that under the circumstances, signs of recent use were not sufficient to revive a reasonable expectation of privacy.

¶ 26 In *Oswald,* the defendant's car "burst into flames" while he was driving through rural Tennessee. *Oswald,* 783 F.2d at 664. The defendant pulled the car to the roadside and leapt from the car, leaving the key in the ignition and a briefcase full of cocaine in the trunk. *See id.* A passing motorist stopped and offered to help, however, the defendant instead asked the driver to take him to a telephone. *See id.* The defendant then left the scene in the car of the passing motorist, an act that was witnessed by a number of others in the area. *See id.* Soon thereafter, local fire and police officials responded to the burning car, and, after the flames were extinguished, the police officer searched the car, finding, among other things, the case containing the cocaine. *See id.* at 664-65.

¶ 27 The officer transferred the items he had found to his patrol car's trunk, took the key (and the steering column to which the key was fused after the fire) and continued prosecuting his duties. *See id.* at 665. Approximately two hours later, knowing full well that the car's owner or driver had neither reported the fire, nor returned to the scene, the officer began to search the items collected from the car. *See id.* Among the belongings, the officer first discovered the defendant's identification, and then the officer pried the briefcase open, discovering a large quantity of cocaine. *See id.* Some time later, the defendant was arrested and charged with

possession with intent to distribute, whereupon he moved to suppress the evidence pulled from his car *See id* The trial court denied the motion, and the defendant entered a conditional guilty plea *See id*

¶ 28 On appeal, the defendant renewed his argument *See id* The court, in examining the issue, stated, "[w]hether property has been 'abandoned,' in this sense does not depend on where legal title rests, or whether one asserting a Fourth Amendment right has a legally enforceable possessory interest in the property, the question, rather, is whether the person claiming the protection of the Fourth Amendment 'has a legitimate expectation of privacy in the invaded place ' " *Id* at 666 (quoting *Rakas v Illinois,* 439 U S 128, 143, 99 S Ct 421, 430, 58 L Ed 2d 387 (1978)) The court further stated that "[n]ot only will privacy expectations vary with the type of property involved, but they will vary with the location of the property " *Id* at 666-67 (citation omitted), *see Hester v United States,* 265 U S 57, 59, 44 S Ct 445, 446, 68 L Ed 898 (1924) (establishing the "open fields" doctrine, wherein Fourth Amendment protections are diminished in open fields) Thus, "[o]ne who [chooses] to leave luggage in an unlocked burned-out automobile at the side of a highway in the country can fairly be thought to have a much lower expectation of privacy " *Oswald,* 783 F 2d at 666 Moreover, the fact that "the person happens to be guilty of a crime" does not change the fact that it is reasonable to conclude that a person is considered to have abandoned any reasonable expectation of privacy when they fail to come forward within a short, but reasonable time to claim their property *Id , see United States v Ramapuram,* 632 F 2d 1149, 1155 (4th Cir 1980) ("It is sufficient here to observe that whatever expectation of privacy attends a closed but unsecured 'effect' generally is diminished where the 'effect' itself is placed in an area totally without the protection of the Fourth Amendment such as in an open field ")

¶ 29 In conjunction with *Barlow* and *Oswald,* I also believe *Ramapuram* to be instructive, not, however, on the issue of abandonment, but instead regarding the existence of a reasonable or legitimate expectation of privacy In *Ramapuram,* the defendant was accused of stealing 100 sticks of dynamite, ***825** which federal agents subsequently discovered during a warrantless search *See Ramapuram,* 632 F 2d at 1151 The defendant had secreted the dynamite in "the trunk of a Chevrolet automobile which was parked in a field on a farm located in Baltimore County, Maryland, and owned by [the defendant's] father " *Id* The court described the car as a 'junker," but noted that it was titled in the name of the defendant's father, for the benefit of his son, thus, the court treated the defendant as the owner of the car *Id* at 1152, 1156 n 12 The car itself was without "current state licence tags, the trunk lock assembly had been removed and the doors were unlocked " *Id* at 1152 After examining these circumstances, the court determined that the defendant "had no reasonable expectation of privacy" in the car, the contents of its trunk, or its passenger compartment *See id* at 1153 The court based this conclusion, in part, on the fact that ' the thrust of the Fourth Amendment simply does not extend to locations lacking a foundation for reasonably expecting that the materials will be accorded privacy " *Id* The court further stated that " '[w]hat is a reasonable expectation of privacy is by definition related to time, place and circumstance ' " *Id* at 1154 (citation omitted) The court then invoked the United States Supreme Court's test for determining whether a legitimate expectation of privacy "has been invaded by government action " *Id* at 1154 (quotations and citation omitted)

> " 'This inquiry, as Mr Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions The first is whether the individual, by his conduct, has "exhibited an actual (subjective) expectation of privacy," whether, in the words of the *Katz* majority, the individual has shown that 'he seeks to preserve [something] as private " The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable,' " whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable" under the circumstances ' "
> *Id* (citations omitted)

¶ 30 The court then determined that because, (1) the car had been left in an open field, and (2) under the logic supporting the " 'automobile exception,' " and based on ' the actual characteristics of the container" involved, the defendant had no legitimate or reasonable expectation of privacy in the car or its interior *Id* at 1155-56 Finally, the court

examined the impact of the defendant's ownership status on his expectations, and concluded that ownership, in and of itself, was insufficient to change the outcome. *See id.* Instead, the court focused on the defendant's failure to secure the vehicle, either its doors or its trunk, and the fact the defendant did not live on the property where the car was sitting. *See id.* Thus, the court concluded that the trial court had not erred in denying defendant's motion to suppress. *See id.; see also State v. Rubert,* 2001 WL 1285939, *3, 2001 Tenn.Crim.App. LEXIS 853, **8, 9 (stating "[w]hen an individual flees from a vehicle, he or she is deemed to have abandoned the vehicle, thereby losing an expectation of privacy in that vehicle").

¶ 31 I believe these cases are much more salient to the instant case. Moreover, rather than assuming that Rynhart had a reasonable expectation of privacy in the contents of her purse merely because it was a purse, I believe we must examine the totality of the circumstances to determine whether, under these circumstance, any such expectation would have been legitimate. We will only conclude that the expectation was legitimate "if the individual exhibited an actual, subjective expectation of privacy and [the person's] actual expectation is one that society recognizes as reasonable." *People v. Taylor,* 253 Mich.App. 399, 655 N.W.2d 291, 296-97 (2002). "To determine whether [Rynhart] had a reasonable expectation of privacy in [either her purse or her van] sufficient to challenge the search under the Fourth Amendment, we must inquire whether [Rynhart] 'took the normal precautions to maintain her privacy--that is, precautions normally taken by those seeking privacy.' " *Id.* (citations omitted); *see also Rakas v. Illinois,* 439 U.S. 128, 152- 55, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978) (Powell, J., concurring) (stating "the Court has examined whether a ***826** person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy" (citing *United States v. Chadwick,* 433 U.S. 1, 11, 97 S.Ct. 2476, 2483, 53 L.Ed.2d 538 (1977))).

¶ 32 In this case, following an accident resulting in her van coming to rest on the property of another, Rynhart chose to leave the van where it sat. She left it unlocked, illegally parked, and in an uncovered, open field. The analysis is thus guided by the objective fact that any expectation of privacy Rynhart may have had in the vehicle is reduced, as a matter of law, because the object in question is an automobile. *See Wyoming v. Houghton,* 526 U.S. 295, 303, 119 S.Ct. 1297, 1302, 143 L.Ed.2d 408 (1999) (noting that drivers and passengers "possess a reduced expectation of privacy with regard to property that they transport in cars, which 'trave[l] public thoroughfares.' " (alterations in original) (citation omitted)); *California v. Acevedo,* 500 U.S. 565, 569-71, 111 S.Ct. 1982, 1985-86, 114 L.Ed.2d 619 (1991) (discussing the nature of the automobile exception to the warrant requirement of the Fourth Amendment). [FN6] Second, Rynhart left the van in an open field, which, as earlier noted, is not subject to the protections afforded hearth and home under the Fourth Amendment. *See Hester v. United States,* 265 U.S. 57, 59, 44 S.Ct. 445, 446, 68 L.Ed. 898 (1924); *see also Oliver v. United States,* 466 U.S. 170, 178, 104 S.Ct. 1735, 1741, 80 L.Ed.2d 214 (1984) (affirming *Hester* and its principle that no legitimate expectation of privacy arises in open fields). Thus, Rynhart left her vehicle--which traditionally enjoys reduced Fourth Amendment protections--in a field, which enjoys none. She left the vehicle, and its contents, illegally parked and unsecured for several hours following her accident.

> FN6. In citing the automobile exception, I in no way mean to assert that the search was justifiable under this exception. Rather, I point to the automobile exception to highlight one of the factors that suggest Rynhart abandoned any legitimate expectation of privacy she may have had under these circumstances.

¶ 33 In behaving in this fashion, Rynhart, much like the defendant in *Ramapuram,* " 'exhibited [no] actual (subjective) expectation of privacy,' " in that, through her actions, she made no effort to "seek to preserve [something] as private." *Ramapuram,* 632 F.2d at 1154 (alterations in original) (citation omitted); *see Pierre v. State,* 732 So.2d 376, 379 (Fla.Dist.Ct.App.1999) (" 'Sometimes an automobile takes on the characteristics of a man's castle. Other times an automobile takes on the characteristics of an overcoat--that is, it is moveable and can be discarded by the possessor at will.' ") (quoting *Thom v. State,* 248 Ark. 180, 450 S.W.2d 550 (1970)); [FN7] *see also State v. Bradford,* 25 Ariz.App. 518, 544 P.2d 1119, 1120 (1976) (concluding that the defendant abandoned his vehicle when he "fled after attempting to elude a pursuing police car and crashed into a shed on private

property"); *Walker v. State,* 228 Ga.App. 509, 493 S.E.2d 193, 194- 95 (1997) (concluding that the defendant voluntarily abandoned his vehicle when he left it parked on the roadside in anticipation of an encounter with ***827** the police); *Hunt v. Commonwealth,* 488 S.W.2d 692, 693-94 (Ky.Ct.App.1972) (concluding that the defendant abandoned his vehicle after he ran from the police and left his vehicle in a public park for four hours without making any effort to retrieve it); *cf. People v. Hall,* 5 Cal.App.3d 116, 122, 85 Cal.Rptr. 188, 191-92 (Cal.Ct.App.1970); *State v. Rubert,* 2001 WL 1285939, *3, 2001 Tenn.Crim.App. LEXIS 853, **8, 9 (Tenn.Crim.App. October 25, 2001) ("When an individual flees from a vehicle, he or she is deemed to have abandoned the vehicle, thereby losing an expectation of privacy in that vehicle.").

> FN7. The instant case is not dissimilar to *State v. Wynn,* 623 So.2d 848 (Fla.Dist.Ct.App.1993). In *Wynn,* police officers were investigating a possible drug transaction when they noticed two illegally parked vehicles, one of which was the defendant's truck. *See id.* at 848. The officers also noticed known drug dealers standing near the vehicles talking with the occupants. *See id.* After the officers approached, and the drug dealers fled, the defendant "got out of the truck and departed without saying anything to the officers." *Id.* He "left his truck unlocked and illegally parked.... After forty-five minutes, during which time no one returned to the truck, the officer entered the truck to search for identification or registration." *Id.* at 848-49. "During this search, the officer saw a balled-up brown paper bag on the floorboard, opened it, and discovered a large quantity of cocaine in individual plastic bags." *Id.* at 849. On appeal from the trial court's denial of a motion to suppress, the Florida Court of Appeals determined that the defendant had abandoned any expectation of privacy he may have had in the vehicle, thus the search did not implicate the Fourth Amendment. *See id.* at 849; *see also Simmons v. State,* 118 S.W.3d 136 (Ark.App.2003) (concluding that the defendant abandoned his privacy interests in a container when he discarded it as he fled from the police); *State v. Kauffman,* 162 Or.App. 402, 986 P.2d 696, 699 (1999) (concluding that the defendant abandoned his privacy interest when he ceded control of the involved container to a third party and "asked them to hide the bag in the bushes on property that did not belong to him").

¶ 34 Furthermore, from the available case law, it seems clear that whether or not Rynhart had a *subjective* expectation of privacy in her vehicle, when she left it as she did, she created a situation wherein society is not prepared to recognize her expectation as reasonable. *See Ramapuram,* 632 F.2d at 1154 ("The second question is whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable," ' whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." (citations omitted)); *see also United States v. Barlow,* 17 F.3d 85, 88-89 (5th Cir.1994) (discussing voluntary relinquishment of a person's legitimate expectation of privacy in a vehicle); *accord United States v. Oswald,* 783 F.2d 663, 666-67 (6th Cir.1986); *People v. Hall,* 5 Cal.App.3d 116, 122, 85 Cal.Rptr. 188 (Cal.Ct.App.1970); *State v. Wynn,* 623 So.2d 848, 848-49 (Fla.Dist.Ct.App.1993); *Walker v. State,* 228 Ga.App. 509, 493 S.E.2d 193, 195 (1997); *Hunt v. Commonwealth,* 488 S.W.2d 692, 694 (Ky.Ct.App.1972); *State v. Rubert,* No. M2000-00914-CCA-R3-CD, 2001 WL 1285939, *3, 2001 Tenn.Crim.App. LEXIS 853, **8-9 (Tenn.Crim.App. October 25, 2001); *cf. State v. Bradford,* 25 Ariz.App. 518, 544 P.2d 1119, 1120 (1976) (vehicle deemed to be abandoned following an accident from which the defendant fled); *Commonwealth v. Sinclair,* No. 1018-01-2, 2001 WL 1117050, *3, 2001 Va.App. LEXIS 527, **7-8 (Va.Ct.App. September 25, 2001). I can discern no significant difference between the instant case and the aforementioned cases. Thus, there is no principled reason to conclude that society is prepared to recognize Rynhart's subjective expectation of privacy.

¶ 35 Assuming, for the sake of argument, that Rynhart's actions did not demonstrate her wholesale failure "to preserve [something] as private," *Ramapuram,* 632 F.2d at 1154 (alteration in original), I would conclude Rynhart's action resulted in the reasonable conclusion that she abandoned her expectation of privacy, even under existing Utah law. [FN8]

> FN8. This court, in *State v. Rowe,* 806 P.2d 730, 736 (Utah Ct.App 1991), *rev'd,* 850 P 2d 427 (Utah 1992), made the remarkable statement that abandonment is "primarily a factual question of intent." However, not only do I believe that the abandonment issue in *Rowe* was erroneously decided, *see State v. Thurman,* 846 P.2d 1256,

1269 (Utah 1993), I see nothing to support this court's decision to separate Fourth Amendment abandonment analysis from our normal Fourth Amendment analysis. Abandonment should be reviewed as "a mixed question of law and fact." *United States v. Oswald,* 783 F.2d 663, 665-66 (6th. Cir.1986). Thus, as we do in all other search and seizure cases involving the review of a trial court's suppression decision, we should review the trial court's factual findings for clear error, and its conclusions of law for correctness. *See State v. Arroyo,* 796 P.2d 684, 687 (Utah 1990) ("A finding not supported by substantial, competent evidence must be rejected."); *id.* at 689 ("Generally, whether the requisite voluntariness exists depends on 'the totality of all the surrounding circumstances.' " (citation omitted)); *State v. Navanick,* 1999 UT App 265,¶ 7, 987 P.2d 1276 ("The trial court's legal conclusions [made regarding a motion to suppress], however, we review for correctness."). Admittedly, "[v]oluntariness is primarily a factual question," *Thurman,* 846 P.2d at 1262, however, the trial court's ultimate conclusion concerning voluntariness is reviewed for correctness. *See id.* at 1271.

Similarly, I believe that when the central issue is whether or not the defendant has abandoned his reasonable expectation of privacy in a container, vehicle, or other object, "the trial court's underlying factual findings [should] not be set aside unless they are clearly erroneous," but the court's ultimate legal conclusion concerning abandonment should be granted no deference and should be reviewed for correctness. *Id.; see also State v. South,* 932 P.2d 622, 624 (Utah Ct.App.1997) ("We review for correctness the trial court's legal conclusions on motions to suppress. We will overturn the trial court's underlying factual findings only if those findings are clearly erroneous." (citation omitted)).

In the instant case, the trial court made very few factual findings concerning this issue, and very few of the facts were subject to any dispute. The court found that a property owner called the Box Elder Sheriff's Department to report a van had been left on his property. The owner further reported that the van had crashed through two fences and come to rest in a marsh. The record supports this finding. The court further found that the vehicle had been in the marsh for over five hours, and the record also supports this finding. The final two findings relevant to this issue were (1) that the State failed to introduce evidence "of the state of the vehicle," and (2) that the vehicle's owner did not have sufficient time to make arrangements to retrieve the vehicle. Nothing in the record supports the second finding. Thus, in the absence of "substantial, competent evidence," this finding must be reversed. *Arroyo,* 796 P.2d at 687. Moreover, given the other facts available to the trial court, I am uncertain of the materiality of the vehicle's condition. Furthermore, the undisputed facts, left undiscussed by the trial court include: (1) Rynhart left the van and its contents unsecured, (2) Rynhart did not report the accident or the location of the vehicle to the authorities, (3) Rynhart did not inform the property owner of the accident or tell him that she was leaving the van on his property, and (4) Rynhart left the scene of the accident, was not hospitalized, and was able to find her way to the impound lot later in the day to collect the vehicle. There was also no evidence, and Rynhart does not argue, that her decision to leave was in any way influenced by the police, removing any possibility that her flight was coerced. *See, e.g., United States v. Flynn,* 309 F.3d 736, 738 (10th Cir.2002). Consequently, I would conclude that Rynhart's behavior was voluntary as a matter of law.

I would also conclude, again after focusing on the totality of the circumstances, that Rynhart abandoned any legitimate expectation of privacy that she may have otherwise had when she left the van as she did. Following the single car accident, during which Rynhart careened through two fences, the van came to rest in a field or marsh. Said field was not owned by Rynhart, nor was it intended (in that it is a marsh) as a parking area. Rynhart left the van and neither reported the accident to the police, nor did she inform the property owner of the accident or her decision to leave the van. Furthermore, when she left, she did not secure the van or its contents, she left an open bottle of liquor in the van, easily seen by anyone passing by, and she left the van where it had come to rest for over five hours. Thus, Rynhart's failure "to seek to preserve [the materials in the van] as private," *United States v. Ramapuram,* 632 F.2d 1149, 1154 (4th Cir.1980), doomed her motion to suppress. She either had no expectation of privacy that society was prepared to recognize, or she voluntarily abandoned whatever expectation she had, as a matter of law.

***828** In Utah, "the abandonment determination [currently] involves two inquiries: (1) whether the individual relinquished a legitimate expectation of privacy in the item; and (2) whether the relinquishment was voluntary." *State v. Bissegger,* 2003 UT App 256,¶ 14, 76 P.3d 178. Moreover, again under our case law, " '[t]he burden of proving abandonment falls on the state, ... and must be shown by clear, unequivocal and decisive evidence.' " *Id.* (quoting *State v. Rowe,* 806 P.2d 730, 736

(Utah Ct.App.1991)).

¶ 36 Here, the van had been involved in a single car accident. After crashing through a fence, it came to rest in a marsh, owned by someone other than Rynhart. Following the accident, Rynhart, for reasons unclear from the record, got out of the van, leaving her purse, briefcase, and a half-consumed bottle of liquor, and left the scene. She left the van unlocked, its contents fully available to any curious passerby. She reported the accident to neither the police, nor the property owner. Over five hours later, the police were called to the accident by the property owner, yet Rynhart had made no effort to contact the authorities. Therefore, even if we were to assume that Rynhart maintained a legitimate privacy interest in the van immediately following the accident, the record clearly reflects that Rynhart relinquished her privacy interest in the van and its contents. *See Bissegger,* 2003 UT App 256 at ¶ 14, 76 P.3d 178; *cf. California v. Greenwood,* 486 U.S. 35, 41, 108 S.Ct. 1625, 1629, 100 L.Ed.2d 30 (1988) (stating "the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public," and " 'what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection' " (citation and alteration omitted)).

¶ 37 It is also clear from the record that the relinquishment was her own decision and not the product of official coercion or force. *Cf. State v. Vancleave,* 2001 UT App 228,¶ 12, 29 P.3d 680 (equating voluntariness to being " 'free from official coercion' " in the context of waiver of counsel (citation omitted)), *cert. denied,* 40 P.3d 1135; *accord United States v. Flynn,* 309 F.3d 736, 738 (10th Cir.2002) ("In order to be effective, abandonment must be voluntary. It is considered involuntary if ***829** it results from a violation of the Fourth Amendment.... [P]roperty is considered to have been involuntarily abandoned if the defendant discards it as a consequence of illegal police conduct." (citations omitted)); *Hypolite v. State,* 985 S.W.2d 181, 187 (Tex.App.1998) ("In order for an abandonment to occur, the decision to abandon must not be the product of police misconduct."); *Commonwealth v. Sinclair,* 2001 WL 1117050, *2, 2001 Va.App. LEXIS 527, *7 (Va.Ct.App. September 25, 2001) ("[I]ntention is a prime factor in determining whether there has been an abandonment. And courts must determine intent ... from the objective facts at hand. Abandonment may be demonstrated, for example, when a suspect leaves an object unattended in a public place." (second alteration in original) (quotations and citations omitted)).

¶ 38 In this case, at the time Rynhart crashed through the fence, she was not, in any way, involved with the police, nor was the police department even aware of the accident until over five hours after it occurred. Thus, her decision was neither the product of police coercion or any other police misconduct, and was, accordingly, made voluntarily. As a result, Rynhart voluntarily relinquished any legitimate expectation of privacy in her vehicle in leaving it as she did following the accident. Consequently, the officer's search of the vehicle did not, in any way, violate Rynhart's Fourth Amendment rights.

¶ 39 For the foregoing reasons, I believe that the abandonment standard we have adopted in Utah is flawed and contrary to generally accepted Fourth Amendment abandonment analysis. At a minimum, we should abandon the subjective approach to the analysis in favor of an objective analysis of intent. However, whether analyzed under the generally accepted standard, or under our flawed approach, I believe that Rynhart abandoned her expectation of privacy in the van. Thus, the trial court's order should be affirmed. Accordingly, I dissent from the majority decision to suppress the evidence discovered during the search.

81 P.3d 814, 487 Utah Adv. Rep. 18, 2003 UT App 410

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Addendum B

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF UTAH
IN AND FOR THE COUNTY OF BOX ELDER

THE STATE OF UTAH, **Plaintiff,** **vs.** **TANJA RYNHART,** **11680 North Rocky Point Rd.** **Bothwell, UT 84337** **DOB: 02/25/66** **Defendant.**	**MEMORANDUM DECISION** **Case No. 021100039 FS** **HON. BEN H. HADFIELD**

This matter comes before the court on Defendant's *Motion to Suppress.* Defendant seeks to suppress evidence found in her purse when an officer searched it on finding it in her vehicle. On 6 January 2002 a property owner who happens to be the Box Elder County Sheriff called officer Burnham about a vehicle that had jumped the curb, crashed through two fences and came to rest off the road in a marsh. Upon investigating, Officer Burnham discovered that the vehicle had been there at least five or six hours and that the driver was not anywhere near the vehicle. Officer Burnham searched the vehicle and the purse in an effort to determine who the driver was.

The Defendant frames the issue as whether the officer conducted a proper search

> be determined from the facts and circumstances). The burden of proving abandonment falls on the state, *People v. Contreras*, 210 Cal. App. 3d 450, 259 Cal. Rptr. 290, 293 (1989), and must be shown by "clear, unequivocal and decisive evidence." *Friedman v. United States*, 347 F.2d 697, 704 (8th Cir. 1965). *See also United States v. Boswell*, 347 A.2d 270, 274 (D.C. 1975); *O'Shaughnessy v. State*, 420 So. 2d 377, 379 (Fla. Dist. Ct. App. 1982). It "is measured from the vantage point" of the defendant, [**19] and not the police. *Narain v. State*, 79 Md. App. 385, 556 A.2d 1158, 1161 n.4 (1989). "It is only the [defendant's] state of mind that counts." Id.

State v. Rowe, 806 P.2d 730, (Utah Ct. App. 1991) *rev'd on other grounds State v. Rowe*, 850 P.2d 427 (Utah 1992). Applying the standards set forth in *Rowe*, the court must conclude that the State has failed to carry its burden to show abandonment. The officer inspected the vehicle at 8:30 in the morning and determined that it had been in the marsh since at least 3:00 a.m. that morning. The owner or driver would not have had time to make arrangements to retrieve the vehicle if it was damaged. The State failed to present any evidence of the state of the vehicle. If the vehicle could be driven, then the officer may have been more justified in believing that it had been abandoned. Although there clearly had been an accident, it appears that no other vehicles were involved. The apparent early hour, the winter conditions, and the single vehicle nature of the accident all combine to belie the officer's imputing an intent to abandon the vehicle.

The court does find, however, that the community caretaker function of the officer was properly invoked here. The accident occurred around 3:00 a.m. on a cold January night. The absence of the driver made it imperative that the officer identify the driver so that he or she

could be found. The driver could have been in distress and lost or disoriented. The officer acted appropriately in attempting to determine who was the driver. Although the Defendant makes a good point that the owner of the vehicle could be ascertained by using the license plate number, the owner and the driver are not necessarily the same person, and the officer had a duty to ascertain the facts in order to preserve life in the event the driver had wandered off and was lost. As such, all three prongs of the *Salt Lake City v. Davidson*, 2000 UT App 12 994 P.2d 1283 (2000) test are satisfied. (1) The officer had an objectively reasonable basis to believe that an emergency existed – a vehicle involved in an accident in the early morning hours that had been left by its driver. (2) The officer testified that the search was for the purpose of ascertaining who was the driver so that the motivation was not primarily to arrest or seize evidence, and (3) it was reasonable to search the purse in connection with the emergency.

The motion to suppress is denied. Counsel for the State shall prepare an order in conformance with this decision.

Dated this 21 day of Aug., 2002

By the court

Ben H. Hadfield

Judge Ben H. Hadfield
District Judge

Addendum C

§ 41-6-32. Collision with unattended vehicle or other property—Duties of operator—Penalty

(1)(a) The operator of a vehicle that collides with or is involved in an accident with any vehicle or other property that is unattended and that results in damage to the other vehicle or property shall immediately stop and shall:

(i) locate and notify the operator or owner of the vehicle or the owner of other property of the operator's name and address and the registration number of the vehicle causing the damage; or

(ii) attach securely in a conspicuous place on the vehicle or other property a written notice giving the operator's name and address and the registration number of the vehicle causing the damage.

(b) If applicable, the operator shall also give notice under Subsections 41-6-31(2) and (3).

(2) A person who violates Subsection (1) is guilty of a class B misdemeanor.

Laws 1941, c. 52, § 22; Laws 1977, c. 269, § 2; Laws 1987, c. 138, § 26; Laws 1999, c. 44, § 3, eff. May 3, 1999.

Codifications C 1943, § 57-7-99.